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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-72

IN THE

Supreme Court of the United States

October Term, 1990

JUDY C. BROWN and LEWIS F. BROWN, Individually and As Next Friends of REIDER P. M. BROWN, A Minor and REISE G. L. BROWN, A Minor, Deceased
Petitioners

vs.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE AND CASUALTY COMPANY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NORTH AMERICAN LIFE AND CASUALTY COMPANY

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court should review the court of appeals' decision based solely upon its interpretation of Texas statutes, where Petitioners have not contended that the court of appeals' interpretation of state law was erroneous.

2. Whether there is a sufficient basis for review by this Court of the court of appeals' decision based upon an alleged conflict among the circuit courts of appeals regarding the impact of stop-loss insurance upon a self-insured employee benefit plan.

Federal Statutes:

Texas Statutes:

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BRIEF IN OPPOSITION OF RESPONDENT NORTH AMERICAN LIFE AND CASUALTY COMPANY

Respondent, North American Life and Casualty Company (hereinafter "NALAC"), respectfully requests this Court to deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered on April 11, 1990. That opinion is reported at 897 F.2d 1351.

OPINIONS BELOW

NALAC does not contest the statement of the opinions of the United States District Court for the Southern District of Texas and of the United States Court of Appeals for the Fifth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

NALAC does not contest the statement of jurisdictional grounds set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners contend that the TuneUp Masters, Inc. Employee Benefit Plan (the "Plan") is an insured plan. *See* Petition for Writ of Certiorari at 5. However, the Plan is actually a self-insured group medical plan established in 1980 by TuneUp Masters, Inc. ("TuneUp Masters") to provide certain health care benefits for its eligible employees and their dependents. The Plan is an employee welfare benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §1002(1) and (3). At all times material to this case, the Plan was administered by First Fund Insurance Administrators, Inc. ("First Fund"), which was solely responsible for processing and paying claims submitted by TuneUp Masters' employees and their dependents under the Plan.

The Plan is covered by an excess risk insurance policy (the "Policy") issued by NALAC to the NALAC Employers Insurance Trust TuneUp Masters, Inc. (the "Policyholder"). The Policy provides stop-loss coverage which reimburses the Plan for the amounts the Plan pays out in claims for each covered person in excess of $30,000 per Policy Year, not to exceed the Plan's total lifetime maximum per covered person of $250,000. NALAC has no authority to either approve or deny claims under the Plan or to amend the Plan.

In response to rapidly escalating benefit payments, due primarily to large expenses incurred in connection with the treatment of a premature baby born to another employee of TuneUp Masters, TuneUp Masters amended the Plan effective February 1, 1985, by adding various cost containment measures. Among these measures was a 30-day waiting period before newborn babies would be covered under the Plan. Any medical condition which arose before the expiration of the 30-day waiting period would be subject to the total disability and preexisting condition provisions of the Plan. A new Summary Plan Description which described these

changes was prepared in 1985 and distributed to TuneUp Masters' employees.

On January 5, 1986, Petitioner Judy C. Brown gave birth to Reider Brown, who was premature and suffered from medical problems related to his premature birth. On November 24, 1986, Judy C. Brown gave birth to Reise Brown, who also was premature and suffered from birth defects as well as other medical problems related to his premature birth. Reise died after five months. First Fund, on behalf of the Plan, denied Petitioners' claims for payment of their medical bills for the treatment of Reider and Reise Brown because the expenses were incurred either during the 30-day waiting period or during the time that Reider and Reise were excluded because of their hospital confinement under the total disability provision or the preexisting condition provision. The claim denials by First Fund were reviewed by the Plan's Trustees, who affirmed First Fund's decision.

Petitioners filed suit in the 133rd District Court of Harris County, Texas against Andy Granatelli, as Trustee of the Plan, the Plan itself, and others, to recover benefits under the Plan. Respondents removed the case to the United States District Court for the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. §1441(a), based upon 28 U.S.C. §1331 (federal question jurisdiction) because the Petitioners' claim arose under and is governed exclusively by the provisions of ERISA. Thereafter, NALAC was added as a party defendant.

Since all parties agreed that there was no dispute regarding the facts in the case, Petitioners and Respondents filed cross-Motions for Summary Judgment. On January 30, 1989, the district court entered a Memorandum and Order and a Final Judgment granting Respondents' Motions for Summary Judgment and denying Petitioners' Motion for Summary Judgment.

Petitioners timely appealed to the United States Court of Appeals for the Fifth Circuit. Petitioners admitted " . . . that if Article 3.70-2(E) by its letter applied directly to employee benefit plans, its application would be preempted by ERISA." *Brown v. Granatelli*, 897 F.2d at 1353. Petitioners' issue was whether Tex. Ins. Code Art. 3.70-2(E) applied to the Plan indirectly through the stop-loss Policy.

After hearing oral argument, the court of appeals on April 11, 1990, affirmed the decision of the district court by holding that Art. 3.70-2(E) does not apply to the Policy for reasons based upon its interpretation of Texas statutes. For the reasons discussed below, the Petition for Writ of Certiorari should be denied.

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED

The court of appeals' decision in *Brown* was based upon its interpretation of a Texas statute, Tex. Ins. Code Art. 3.70-2(E). As a result, the court did not have to decide any of the ERISA issues. Petitioners have not cited any cases which show that the court's interpretation of the Texas statute is erroneous. In fact, the Petitioners do not even refer to either the court of appeals' decision or Tex. Ins. Code Art. 3.70-2(E) in their "Questions Presented for Review" and "Reasons for Granting the Writ". Consequently, this Court has no reason to review the court of appeals' interpretation of Tex. Ins. Code Art. 3.70-2(E).

Petitioners imply in their "Reasons for Granting the Writ" that there is a conflict among the circuits regarding the impact of stop-loss insurance, although they do not raise that as a question for review. Since the court of appeals concluded that it did not have to reach the federal question regarding stop-loss insurance, this case does not affect the alleged conflict. In addition, a careful review of the cases cited by Petitioners shows that, in any event, there is no conflict among the circuits regarding stop-loss insurance.

Petitioners' final two "Questions Presented for Review" relate to extra-contractual causes of action and preemption by ERISA. These issues were never reached by either the district court or the court of appeals in their decisions. Therefore, there is no lower court decision regarding these questions for this Court to review.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT BASED ITS DECISION UPON TEXAS STATUTES, AND ITS INTERPRETATION OF TEXAS LAW IS NOT ERRONEOUS

The Petitioners admitted before the court of appeals that Tex. Ins. Code Art. 3.70-2(E) did not apply directly to the Plan. However, Petitioners argued that the Texas statute could be applied indirectly to the Plan through the stop-loss Policy issued by NALAC. Article 3.70-2(E) states that:

> "[n]o individual policy or group policy of accident and sickness insurance . . . delivered or issued for delivery to any person in this state which provides for accident and sickness coverage of additional newborn children or maternity benefits, may be issued in this state if it contains any provisions excluding or limiting initial coverage of a newborn infant for a period of time, or limitations or exclusions for congenital defects of a newborn child."

The court of appeals held that Art. 3.70-2(E) does not apply to a stop-loss policy. The court first reviewed the purpose of Subchapter G of the Texas Insurance Code:

> "The focus of Subchapter G is on protecting sick or injured individuals; Subchapter G has nothing to say about protecting employee benefit plans from catastrophic loss. The statement of purpose in Subchapter G is illustrative. It states:
>
> > 'The purpose of the Act shall be to provide for reasonable standardization, readability, and simplification of terms and coverages contained in individual accident and sickness insurance policies; to facilitate public understanding of coverages; to eliminate provisions contained in individual accident and sickness insurance policies which may be unjust, unfair, misleading, or unreasonably confusing in connection with the purchase of such coverages or with settlement of claims; and to provide for full and fair disclosure, in the sale of accident and sickness coverages.'
>
> Tex. Ins. Code Ann. Art. 3.70-1 (Vernon 1981)."

897 F.2d at 1354. The court did not believe that stop-loss insurance, which is intended to insure an employee benefit plan, rather than insuring the employee benefit plan participants directly, fell within the purpose espoused by the Texas legislature. "By adopting words of exclusion to express its purpose the Texas legislature plainly intended that coverage be mandated only when the primary coverage of a policy is for health and accident coverage. Here the primary coverage is for the Plan's catastrophic losses." *Id.* at 1355.

The court also based its decision upon the Texas statutory definition of a group policy of accident and sickness insurance. Tex. Ins. Code Art. 3.51-6(1)(a) defines group accident and health insurance:

> "... to be that form of accident, sickness, or accident and sickness insurance covering groups of persons as provided in Subdivisions (1) through (6) below:
>
> (1) Under a policy issued to an employer or trustees of a fund established by an employer, who shall be deemed the policyholder, insuring employees of such employer for the benefit of persons other than the employer ..."

The court held that a stop-loss policy does not fall within this definition of a group policy. "Read literally, the stop-loss policy purchased by the Plan is not an 'individual' or 'group' policy since it does not benefit individuals, but the Plan itself." 897 F.2d at 1355. Since the court of appeals' affirmance of the district court's decision was based solely upon state law, it never had to reach the ERISA preemption issues.

> "... [B]ecause we conclude that Article 3.70-2(E) does not apply to stop-loss insurance purchased by an employee benefit plan to insure that plan against catastrophic loss, we do not reach the ERISA preemption issues as to stop-loss insurance coverage."

Id. at 1352. The district court of Maine has also held that stop-loss insurance is not group insurance. In *Cuttle v. Federal Employees Metal Trades Council*, 623 F.Supp. 1154 (D. Me. 1985), the court had to determine whether a stop-loss policy fell within a state statutory definition of "group insurance" which is similar to the definition of "group accident and health insurance" in Tex. Ins. Code Art. 3.51-6(1)(a). In *Cuttle*, the plan was self-insured and had a stop-loss policy which reimbursed the plan for amounts paid by the plan in excess of $20,000. *Id.* at 1156. A Maine statute required group health insurance policies to include a provision permitting a terminating participant to convert his group coverage to an individual policy. The court held that the stop-loss policy was not a group insurance policy.

> "Neither can the statute be applied to the plan because it carries the stop-loss insurance. That policy is not a group health insurance policy within the meaning of the applicable statutes. 24-A M.R.S.A. §§2804-2806. All of those statutes specify that a group policy must be established to insure employees for the benefit of persons other than the union or trustee or employer which has obtained the group policy. The stop-loss policy insures the issuer of the plan for the benefit of the fund or plan."

Id. at 1157. Consequently, the court held that the conversion statute would not apply to the plan.

This Court has repeatedly held that it will not review a court of appeals' interpretation of a state statute. "Moreover, this Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect." *Cort v. Ash*, 422 U.S. 66, 72, 95 S.Ct. 2080, 2085, 45 L.Ed.2d 26 (1975). ". . . [T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such

guidance might have justified a different conclusion." *Bishop v. Wood,* 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 648 (1976). "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States,* 440 U.S. 48, 58, 99 S.Ct. 914, 919, 59 L.Ed.2d 136 (1979). "Normally, however we defer to the construction of a state statute given it by the lower federal courts." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 490, 499, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394 (1985).

The exception to the U.S. Supreme Court's deference to a court of appeals' interpretation of a state law is the situation in which the Court determines that the court of appeals is clearly wrong or erroneous in its interpretation. See *Bishop v. Wood,* 426 U.S. 341, n. 10 at 346, 96 S.Ct. 2074, n. 10 at 2078; *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 490, n. 9 at 500, 105 S.Ct. 2794, n. 9 at 2800; and cases cited therein.

In the case at bench, Petitioners have not cited any regulation, interpretation or case which disputes the interpretation of Tex. Ins. Code Art. 3.70-2(E), Tex. Ins. Code Art. 3.70-1, or Tex. Ins. Code Art. 3.51-6(1)(a) by the Court of Appeals for the Fifth Circuit. In fact, Petitioners do not state anywhere in their Petition that they disagree with the court of appeals' interpretation of the Texas statutes. Since the court of appeals based its decision solely upon Texas statutes (rather than federal law), which the Petitioners do not dispute, this Court should not review the court of appeals' decision.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE PURCHASE OF STOP-LOSS INSURANCE CONVERTS A SELF-INSURED PLAN INTO AN INSURED PLAN.

Petitioners imply that there is a conflict between the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Ninth Circuit because of the decisions in *Michigan United Food & Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985), *cert. denied*, 474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986), and *Moore v. Provident Life & Acc. Ins. Co.*, 786 F.2d 922 (9th Cir. 1986). *See* Petition for Writ of Certiorari at 5. Petitioners do *not* allege that the Fifth Circuit decision in *Brown* is in conflict with another circuit's decision regarding stop-loss insurance. A review of the facts in *Baerwaldt* and *Moore* reveals that the situations are very different in these cases and, therefore, they are not in conflict.

In *Baerwaldt*, plaintiffs were contesting whether a Michigan mandatory benefits law applied to their employee welfare benefit plan. Under that statute,

> " '[e]ach insurer offering health insurance policies in this state shall provide coverage for intermediate and outpatient care for substance abuse, upon issuance or renewal, in all contracts for, group and individual hospital, medical, surgical expense-incurred health insurances [sic] policies other than limited classification policies.' "

767 F.2d, n.1 at 310. The plans had purchased group insurance policies from Occidental Life Insurance Company. The plans would pay benefits up to a certain amount and, after that amount was reached, Occidental would pay *directly* to the participants any additional benefits under the applicable policies. The court held that the mandated benefits law fell within ERISA's savings clause. However, the plans were not exempt under the deemer clause because the Occidental

insurance policies paid benefits directly to the participants and the statute was intended to affect any insurer who offers health insurance policies in Michigan.

> "According to the Complaint's description of the plans, the plans include an arrangement whereby the plans pay premiums to Occidental to insure that Occidental will pay all benefits in excess of the claims liability limit under the group policies. As long as the plans purchase insurance from 'an insurer offering health insurance policies in' Michigan, the policies must include the substance abuse coverage specified by Act 429."

767 F.2d at 313.

In *Moore v. Provident Life & Acc. Ins. Co.*, a former employee brought suit to recover benefits under his former employer's self-funded employee benefit plan and for punitive damages for alleged violations of ERISA and California insurance law. In contrast to *Baerwaldt*, the employee benefit plan was covered by a stop-loss policy issued by Provident which reimbursed the plan when claims paid by the plan exceeded a specified aggregate amount during any policy year. 786 F.2d at 927. The court held that the plan fell "... within the 'deemer' clause as an uninsured plan, and [that] an excess coverage or a 'stop-loss' policy which protects the trust or other employee benefit plan from catastrophic loss does not change this result." In *Bone v. Association Management Services, Inc.*, 632 F.Supp. 493 (S.D. Miss. 1986), the court drew a distinction between the facts in *Baerwaldt* and *Moore:*

> "Due to the fact that insurance policy in question insures the Plan itself, and not individual participants, Plaintiffs' reliance on *Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985), is misplaced. Under the provisions of the partially insured plan at issue in *Michigan United Food*, the plan paid all health and welfare benefits up to an agreed amount and after that liability limit was reached,

> the insurer was liable to the individual participants for payment of additional benefits."

Bone, 632 F.Supp. at 495.

Petitioners had previously stated that there was also a conflict with the Sixth Circuit's decision in *Northern Group Services v. Auto Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988), which involved a Michigan state insurance statute requiring auto liability carriers to provide reduced premium rates, deductibles and exclusions if the insured is covered by any health or accident plan. In exchange, the health or accident plan would be the primary insurance carrier for medical expenses arising out of a car accident and the auto insurer would be the secondary insurance carrier. The court refused to exempt any employee welfare benefit plan under ERISA from compliance with the coordination of benefits provision of the statute because of the potential injury to the state scheme.

> "Exemption of [this] plan and other self-insurers from the Michigan rule . . . would disrupt the State's ability to administer a uniform scheme of 'other insurance' or 'coordination of benefits' law. Not only would exemption frustrate the goal of cost containment, it would also create unpredictability and possibly undermine the financial stability of no-fault insurers."

Id. at 93.

However, two subsequent decisions by the Court of Appeals for the Sixth Circuit have modified the *Northern Group* decision. First, in *Liberty Mutual Ins. v. Iron Workers Health Fund*, 879 F.2d 1384 (6th Cir. 1989), the Iron Workers self-insured health plan excluded coverage for expenses incurred as a result of a car accident. Liberty Mutual sued the plan for reimbursement of medical expenses it paid on behalf of a union member who was injured in a car accident. The union member also was a participant in the Iron Workers health plan. The court held that Liberty Mutual was not

entitled to reimbursement because the Michigan statute only regulates the order of payment, primary or secondary. The statute does not regulate the contents of a plan.

> "The *Northern Group Services* court was not interpreting a statute which requires ERISA plans to provide coverage for automobile accidents even where the plan's unambiguous language excludes such coverage. Section 3109 . . . did not regulate the content of welfare benefits provided by ERISA plans, but merely required plans which provide automobile accident coverage to assume primary liability when such coverage is also provided by a no-fault carrier."

Id. at 1387-88. The *Liberty Mutual* decision substantially limited the impact of the original *Northern Group* decision. Employee welfare benefit plans are not required to include a state mandated benefit for expenses arising out of a car accident. Instead, the statute only determines who will be the primary carrier if the accident and health plan provides coverage for car accidents. The *Northern Group* decision was eroded even further by the Sixth Circuit in *Northern Group Services, Inc. v. State Farm Mutual Auto Ins. Co.*, 898 F.2d 1125 (6th Cir. 1990) (*"Northern Group II"*). The court of appeals there stated that "[f]or purposes of deciding the federal preemption question, and that question only, we merely assumed, without deciding, that the coordination rules of §3109a applied to both insured and uninsured ERISA plans." *Id.* at 1126. The court admitted that it did not decide in its original *Northern Group* decision whether the Michigan statute actually applies to a self-insured plan.

> "We ruled only on the federal claim of preemption, the federal issue then before us, and did not attempt to rule on any pendent state claim requiring an explication of state law. We did not consider or rule, for example, on the question whether uninsured ERISA plans constitute 'health and accident coverage' and thus whether §3109a — as a matter of state law — applied to self-insured plans."

Id. Therefore, according to the decision in *Northern Group II*, the Sixth Circuit has not yet reached the issue decided by the Fifth Circuit in *Brown*, namely, whether a self-insured plan covered by a stop-loss policy constitutes "health and accident coverage."

As discussed previously, Petitioners have not alleged in their Petition that there is a conflict between the Fifth Circuit's decision in *Brown* and any other decision from another circuit regarding the effect of stop-loss insurance on self-insured plans. The only cases cited by Petitioners are from the Sixth Circuit and the Ninth Circuit. However, as shown above, the facts and holdings involved in each decision reveal that the cases are so dissimilar that they cannot be considered in conflict with each other.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The Court of Appeals for the Fifth Circuit based its decision upon Texas statutes. Petitioners have not raised any question regarding an error in the Fifth Circuit's interpretation of the state statutes. Further, the Petitioners have not cited any conflict among the circuits regarding stop-loss insurance which involves the decision in *Brown,* and they have conceded before the court of appeals that Tex. Ins. Code Art. 3.70-2(E) would not apply to the Plan itself. Finally, Petitioners' questions regarding ERISA's preemption of extra-contractual causes of action do not even involve the Fifth Circuit's decision in *Brown.* The court of appeals never reached the extra-contractual preemption issue because it determined that none of the Respondents were liable to Petitioners for Plan benefits.

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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